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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,
Appellant,
and
ROBERT ABRAMS, as Attorney General of the State of New York,
Intervenor-Appellant,
V.
GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE, TEXAS DISTRICT AND COUNTY ATTORNEYS ASSOCIATION AND THE LEGAL FOUNDATION OF AMERICA

OF COUNSEL:

TOM KRAMPITZ
Executive Director
Texas District & County
Attorneys Association
1210 Nueces, Suite 200
Austin, Texas 78701

DAVID CRUMP
The Legal Foundation of America
c/o South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amici Curiae

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BRIEF OF AMICI CURIAE, TEXAS DISTRICT AND COUNTY ATTORNEYS ASSOCIATION AND THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICI CURIAE

The Texas District and County Attorneys Association ("TDCAA") is a non-profit association of more than 1,000 elected district attorneys, county attorneys, and their assistants practicing in Texas. Its basic propose, as stated in the Bylaws of the Association, is to "promote the improvement of prosecution in Texas." TDCAA conducts regular continuing education programs in both civil and criminal law, and it publishes books on

subjects of interest to its members. It also takes public positions on matters significant to the enforcement of law.

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm, located on the campus of the South Texas College of Law in Houston. It shares certain personnel and activities with the law school.* Its goals include the preservation of a rational system of criminal justice. In pursuit of this goal, LFA has appeared as amicus curiae in this honorable Supreme Court, in federal appellate and district courts, and in the courts of various states, in criminal law matters. In particular, LFA has taken an interest in pretrial detention of dangerous offenders.**

Amici have an interest in the provision of the New York statute at issue here because amici are vitally interested in the preservation of the analogous Texas juvenile detention provisions, Tex. Fam. Code Ann. secs. 53.02, 54.01 (1976).*** Fur-

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* Amicus curiae wish to acknowledge, with thanks, the assistance of law student Mary Burke in the preparation of this brief.

** For example, LFA appeared as amicus curiae in this Court last term in Murphy v. Hunt, No. 80-2165.

*** A child may be detained prior to hearing if he is likely to leave the court's jurisdiction, if he is not likely to be provided with suitable care, if he has been accused of a felony and may be dangerous to himself or others, or if he was found previously delinquent or convicted of a punishable offense and is likely to commit another offense if released. Tex. Fam. Code, supra, sec. 53.02. A detention hearing must be held within two days after custody. The court considers reports from probation officers and professional consultants in determining whether the child can be released pursuant to the criteria in Tex. Fam. Code, supra, Section 53.02. A detention order is effective for no more than ten days. Tex. Fam. Code, supra, sec. 54.01. The procedure for such detention hearings is considered so onerous in relation to the relatively brief detention that can result from it, that such orders, in Texas, are not routinely sought, and are confined as a practical matter to serious offenses, clear repeat offenses, or juveniles without adequate support, lodgings or custodians.

ther, amici would respectfully urge the Court, in deciding this case, not to hold bail denial or preventive detention unconstitutional as a general proposition. There is valid reason for detaining certain dangerous or repeat offenders. The States vary in their statutes governing both juvenile and adult detention (Texas, for example, has three different detention categories applicable to adults).**** In a federal system, such diversity should be permitted.

STATEMENT OF THE CASE

Amici adopt the statement of the case made by Petitioners. Amici would emphasize that Respondents here were charged with (and shown by prima facie evidence to have engaged in) violent offenses that were by their nature likely of repetition and that circumstances (such as the giving of a false address, prior criminal record, etc.) corroborated the "serious risk" finding.

SUMMARY OF ARGUMENT

I.

The philosophy of juvenile justice is rooted in the common law doctrine of parens patriae. Colonial America imported this doctrine and extended it to include delinquents and criminal behavior. The history of juvenile detention shows that the concept was constitutionally acceptable to the drafters of the relevant constitutional language.

II.

Even if adult standards are applicable to juveniles, examination of the history of the "excessive bail" and due process clauses overwhelmingly indicates that the drafters did not regard these

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**** TEX. CONST. art. 1, secs. 11-11a (Vernon Supp. 1981) (capital cases wherein "proof is evident;" also, certain prior offenders on "substantial" proof of guilt); ex parte Jones, 460 S. W. 2d 428 (Tex. Crim. App. 1970).

provisions as a guaranty of a right to pretrial release. New York's approach is constitutionally acceptable in this regard, as is Texas'.

III.

This Honorable Court should not prefer a categorical evaluation by specific evidentiary "factors" to other statutory models for detention, including individualized evaluation. Any single model standing alone can introduce elements of judicial discretion that can in theory be abused. In a federal system, this honorable Supreme Court should allow different kinds of statutes to exist among the fifty States, and it should not attempt to decide which model is "best" or to impose that judgment upon the legislative branch.

ARGUMENT

I. JUVENILES HAVE NOT HISTORICALLY BEEN, AND SHOULD NOT BE, TREATED IDENTICALLY TO ADULTS WITH RESPECT TO DETENTION. THE UNDERSTANDING OF THOSE WHO DRAFTED THE CONSTITUTION WAS THAT JUVENILE OFFENDERS WERE MORE READILY DETAINABLE THAN ADULTS, FOR REASONS THAT REMAIN VALID TODAY.

The protective care of juveniles was founded in the parens patriae doctrine of common law England and adopted by colonial America. Under this doctrine, pretrial detention in America has never before been considered to deny juveniles due process, and it is inconceivable that the drafters of the fifth or fourteenth amendments intended otherwise.

A. The Parens Patriae Doctrine as Developed in England for Neglected and Dependent Children.

By the 16th century, urban migration resulted in congregation of "fatherless" unkempt children. The problem did not

abate with time and many poor vagrant children were living in the streets and perishing. Juvenile Offenders for a Thousand Years: Selected Readings from Anglo-Saxon Times to 1900 40 (W. Sanders ed. 1940). Poor laws were passed beginning in 1535 which appointed overseers to bind out destitute or neglected children as servants. Apprenticeship existed throughout almost the entire history of Britain. L. Siegal & J. Senna, Juvenile Delinquency: Theory, Practice, and Law 303 (1981) [hereinafter cited as Seigal].

The king invoked the doctrine of parens patriae (literally, "father of the country") to justify intervention into the lives of children whose position or property were of direct concern to the monarch. Siegal 304. He acted in loco parentis, "or in the place of a parent." M. Barron, The Juvenile in Delinquent Society 13 (1956). Through the system of equity, the king exercised his power of guardianship over the person and property of minors, who were considered wards of the state and entitled to special protection. R. Caldwell & J. Black, Juvenile Delinquency 187-8 (1971) [hereinafter cited as Caldwell]. This equitable system separated the delinquent child from his parents and circumvented criminal law by allowing courts to commit the child to special schools and not to jail. Siegal 308.[1]

The English chancery courts continued throughout the 18th and 19th centuries to exercise this jurisdiction. Lord Chancellor Cottenham in In Re Spence, 2 Ph. 247, said:

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1 See also, Shamburek, Comments—A Due Process Dilemma: Pretrial Detention in Juvenile Delinquency Proceedings, 11 J. Mar. J. Prac. & Proc. 513, 516 (Spring 1978) [hereinafter cited as Shamburek] (power in chancery courts for more informal proceedings); A. Coffey, Juvenile Justice as a System 36 (1974) [hereinafter cited as Coffey] (parens patriae and chancery courts ultimate basis of American juvenile court); S. Davis, Rights of Juveniles Juvenile Justice System 2 (1974); E. Eldefonso, Law Enforcement and the Youthful Offender 185-6 (1973) [hereinafter cited as Eldefonso]; C. Flammang, Juvenile Delinquency in a Free Society 131 (R. Winslow ed. 1973) [hereinafter cited as Winslow].

> The cases in which the court interferes on behalf of infants are not confined to those in which there is property . . . This court interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the crown as parens patriae.

See also In Re McGrath, 2 Ch. 496; Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909) [hereinafter cited as Mack].

The chancery courts in early England did not have jurisdiction over children who were charged with criminal conduct. They were handled within the regular criminal court system, which imposed harsh sentences similar to those for adults. Seigal 304.[2] There were no provisions for public institutions for juveniles until the Parkhurst Act in 1838. Caldwell 6.

B. Colonial America Imported the Parens Patriae Doctrine and Extended it to Criminal Acts.

The early American colonies became a haven for poor and unfortunate people, including children. As in England, the colonial child was still subject to adult procedures and punishments for criminal acts. Siegal 305.[3]

The transfer of the English legal system resulted in an extension of the activities of the chancery courts to protect children from personal danger as well as property injury. This extension of the chancery court's protective powers favors juvenile detention. Winslow 132. It becomes a basis for society to intervene in parent-child relationships. Flammang 124.[4]

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2 See also Mack, supra, at 106.

3 Accord, Caldwell, supra, at 6.

4 Accord, Coffey, supra, at 36-37.

The first juvenile institution, created in 1825, was the New York House of Refuge. In considering the power of a court to send a child to the House, Chief Justice Gibson in Ex Parte Crouse, 4 Whart. 9 (1938), said:

> May not the natural parents when unequal to the task of education, or unworthy of it, be superseded by the parens patriae, or common guardian of the community? . . . The right of parental control is a natural, but not an inalienable one. It is not excepted by the declaration of right out of the subject of ordinary legislation.

Mack 111. This rationale, which remains viable today, is a key difference between adult and juvenile offenders.

The first juvenile court was legally created in Chicago, Illinois in 1899. Its philosophy was to treat juveniles charged with crimes not as criminals, but as wards of the state, receiving substitute parental care, trust, and discipline that a neglected detained child might receive. Eldefonso 183. Roscoe Pound declared its purpose not to be that of a criminal court, but of a special court of equity with administrative functions incidental to equity jurisdictions. Caldwell 192, n. 10.

In summary, the parens patriae doctrine developed to refer to the state's responsibility with respect to juveniles. This approach included protection of the incompetent, the neglected, and the delinquent. Siegal 304. This philosophy is effectuated through an "individualized justice" approach. The court adapts orders accordingly, with remedial and preventive results, rather than punitive. Eldefonso 186, n. 3.

C. *The Parens Patriae Doctrine as a Philosophical Basis for the American Juvenile Court System Has Always Satisfied Fourteenth Amendment Due Process Standards.*

The Constitution has never guaranteed an absolute right to be released from detention. The Fourth Amendment permits

arrest on probable cause but says nothing as to how long the arrestee may be held. The Fifth Amendment, although denying detention for a capital crime unless there is a Grand Jury indictment, fails to specify how long an arrestee can be held without indictment. After indictment, the Constitution guarantees a "speedy" trial, but leaves interpretation of the term "speedy" to legislatures and courts. Therefore, courts interpreting the Constitution have generally deferred to legislatures to determine in which cases release may be denied. Meyer, Constitutionality of Pretrial Detention, 60 Geo. L. J. 1382, 1459 (1972) [hereinafter cited as Meyer].

Many states have expressly denied juveniles a right to release on bail (including New York and Texas). S. Davis, Rights of Juveniles—The Juvenile Justice System 3-40.2 (2d ed. 1981) [hereinafter cited as Davis II]. This denial is based on the protective function of juvenile law. In its legislative guide for drafting Family Juvenile Court Acts, the U. S. Department of Health, Education, and Welfare Children's Bureau has stated: "When children are placed in detention or shelter care, there is always a motive to protect the child as well as to protect society. Therefore, as a general rule, bail should not be permitted." M. Midonick, Criminal Law & Practice Handbook Series Number 2—Children, Parents, and the Courts: Juvenile Delinquency, Ungovernability and Neglect 78 n. 2 (1972).

Most statutes do not distinguish between neglect and delinquency in detention procedures. At least thirty-seven states allow preventive detention for community protection, and several states specifically do so only if there is a serious risk that the juvenile is likely to commit a crime if released (New York and Texas included). Shamburek, supra, 522-523 nn. 32-33.

Informalities and discretionary powers in the juvenile system with respect to detention are necessary and desirable. There must be such discretion if the system is to achieve its goals. J. Sprowls, Discretion and Lawlessness: Compliance in the Juvenile Court 13 (1980). Also, a child may be in need of immediate care, and release may be improper without inquiry into the conditions of his environment, which may well be the source of his

difficulty. Paulson, Fairness to Juvenile Offender, 41 Minn. L. Rev. 547, 552 (1957). It would make little sense, for example, to release a juvenile who has committed a senselessly violent murder or robbery to the care of his parents if his parents are inadequate to the task or if the juvenile has not been in their custody—particularly if there is "serious risk" of repetition.

The Uniform Juvenile Court Act (1968) is drafted, according to its statement of purpose, to meet the due process requirements of In Re Gault, 387 U. S. 1 (1967). The Act allows preventive detention to protect the child or other persons or property. Uniform Juvenile Court Act Section 14 (1968).[5]

An absolute or general right to immediate release would be inconsistent with the basic philosophy of the juvenile court—the protection, care, and guidance of the child. Hill, The Constitutional Controversy of a Juvenile's Right to Bail in Juvenile Pre-adjudication Proceeding, 1 Hastings Const. L. Q. 215, 227 (1974).[6] A serious risk that the juvenile will commit a crime if released (N. Y. Fam. Ct. Act section 739 (a) (ii)) involves such a consideration for the welfare of the juvenile as well as the state. In juvenile proceedings, In Re Gault requires only that procedures be measured according to essentials of fairness and due process under the Fourteenth Amendment. Davis II 3-43. The traditional protective benefits of juvenile court proceedings, which require special responsibilities that are not necessarily appropriate for adults, will satisfy fundamental fairness criteria if the provision is properly drafted and properly administered. The New York detention statute is such a provision and should be preserved as well as differently drafted statutes, such as that of Texas.

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5 See also, Standard Juvenile Court Act Section 17; Kalnins, Right to Bail for Juveniles, 48 Chi-Kent L. Rev. 99 n. 50 (1971) (President's Commission on Crime).

6 Accord, Note, 18 Vand. L. Rev. 2096, 2100-2101 (1965).

II. EVEN IF ADULT BAIL STANDARDS ARE APPLICABLE TO JUVENILES, THE HISTORY OF THE EXCESSIVE BAIL AND DUE PROCESS CLAUSES SUPPORTS ENACTMENTS OF THIS NATURE.

"[A] study of the constitutional and statutory provisions which regulate the system of bail in the United States, while revealing an increased regard for the rights of the individual, will nevertheless indicate that *there is no constitutional right to bail.*" Duker, The Right to Bail: A Historical Inquiry, 42 ALBANY L. REV. 33, 34 (1977) [hereinafter cited as Duker] (emphasis added). Duker's is the most thorough recent work on the subject. The evidence marshalled by Duker is overwhelming.[7]

A. English Antecedents of the Excessive Bail Clause Acknowledged the Existence of Legislatively Created Nonbailable Offenses and Were Concerned with Arbitrary Administration of Bail.

The first systematic treatment of bail in England was brought about by the Assize of Claredon in 1166. Prior to that time, all offenses were bailable. The Assize asserted a new interest of the King in law enforcement. It resulted in a list of nonbailable offenses, including "those arrested by our special command, or that of our chief justice, or for an offense in our forest, or for any other [wrong] for which, according to English custom, he is not replevisable." Duker 44-45. Thus began the tradition of non-bailable offenses, which has continued to the present.

The Statute of Westminister I, which was an early bail reform, contained an explicit list of bailable and nonbailable offenses. Duker 45-47. In addition to the nonbailable offenses created by Westminister I, Parliament created others, including certain "vagabonds." Duker 56-58.

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7 Accord, Meyer, 1145-1164.

By the Petition of Rights, in 1628, Parliament caused the King to accept the "law of the land" (i.e., the list of nonbailable offenses of Westminister I) as the authority for denial of bail. He frustrated this law by delays in habeas corpus, prompting the Habeas Corpus Act of 1677. It provided for bail to be set within 3 days "in any sum, according to [the judge's] discretion, . . . *unless . . . by law the prisoner is not bailable.*" Duker 58-66.

This law enforced Westminister I, but the King's justices frustrated it, too, by requiring bail in excessive amounts for bailable offenses as a means of denying bail. Thus ten years after the Habeas Corpus Act, Parliament passed, and the King accepted, the English Bill of Rights. It closed the loophole by declaring that "excessive bail ought not to be required." This Act did not affect nonbailable offenses, which continued to exist. Duker 66.

Since the American Constitution's excessive bail clause was derived from the English Bill of Rights, this history should be illuminative of its meaning. The English Bill did not change the long history of bail denial by statutory enactment. The same concern was expressed in every reform measure following Westminister I, and no reform measure amounted to an effort at wholesale bail guarantees.

Similarly, the due process clause (which has a less specific relationship to bail or to detention) traces to antecedents that coexisted with pretrial detention. Its history includes the imposition of the "law of the land" upon the king in Magna Charta, as well as the Petition of Rights of 1628 and the English Bill of Rights. All of these charters were construed to allow detention pursuant to legislative enactment. See generally Duker, supra; Meyer, supra.

B. The Pre-Constitutional American States Recognized Legislative Creation of Circumstances for Detention.

Pre-constitutional States recognized the non-existence of a general right to bail. Six of the colonies—Connecticut, Delaware, Georgia, Maryland and Rhode Island—simply adopted the rights

guaranteed in England. Duker 80-81. "However, Englishmen in the homeland possessed no right to bail beyond that allowed by the legislature." Id. In Virginia, the Statute of Westminister I was the "core of the law defining which offenses were bailable." Id. at 78. The colonial Virginia legislature enacted protections for persons obtaining bail, "in such case as by law he or she may be bailable." 3 Va. Stat. 391 (Hening ed. 1923). In Massachusetts, bail guaranties did not extend to capital cases, contempt of court, or offenses excluded by express act of the legislature. New York and Pennsylvania adopted colony charters limiting denial of bail to capital offenses, but at certain times they had charters allowing broader bail denial.

After 1776, under the Articles of Confederation, the States made even more clear the legislative power to deny bail. In three states, excessive bail was prohibited to be required "*by courts*," leaving the legislature free to enact denials of bail. In two others, excessive bail was prohibited "for *bailable* offenses." Three merely enacted denials of excessive bail, and the legislatures freely continued to deny bail. The remainder adopted English law, which allowed legislative bail denial. Duker 81-82.[8]

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8 There are other authors who have concluded that the excessive bail clause creates "an absolute right to bail." E.g., Foote, The Coming Constitutional Crisis in Bail (Pt. I.), 113 U. PA. L. REV. 959 (1965). Foote asserts that Mason, as draftsman, lifted the clause from the English Bill of Rights, and that "critical language which is in the preamble of the English Bill of Rights . . . clearly spells out the basic right to bail . . . drawn together from enactments which in England went back to 1215." In the first place, the English Bill of Rights contains no such universal right of bail. In the second place, the English history before and after the English Bill of Rights included legislative denial of bail. In the third place, the more immediate antecedent to the language chosen by Mason was the charters of the colonies, which allowed legislative bail denial. In the fourth place, the English Bill of Rights was preceded only 10 years earlier by the Habeas Corpus Act, which denied bail for "Offenses for which by Law the Prisoner is not bailable," and the English Bill of Rights did not in any wise contravene this express language. See generally Duker, supra, at 84 n. 303; accord, Meyer, supra, 60 GEO. L. J. at 1180-90.

In summary, it is inconceivable that the drafters of the original due process clause of the fifth amendment conceived of it as extending a general right to bail in cases of "serious risk;" and since the due process clause of the fourteenth amendment contains identical wording and was preceded by a similar history, it is equally unlikely that its drafters so conceived it.

III. THIS COURT SHOULD NOT REQUIRE THE SEVERAL STATES TO ADOPT A UNIFORM MODEL OF PRETRIAL DETENTION.

The Court of Appeals concluded that pretrial detention on the basis of predetermined "serious risk" to the community is improper, as it results in punishment before adjudication, denies a juvenile due process rights, and fails to put emphasis on his best interests. This reasoning should be rejected.

A. *An individualized determination for detention of a few days, based on a legislative standard such as "serious risk," does not introduce "uncontrolled" discretion into the process. Such an approach is well within the parameters set by this Court's decisions for even more serious determinations.*

The Court of Appeal's approach holds the statute unconstitutional because it requires an individualized finding of "serious risk" and thereby, according to the Court of Appeals, introduces uncontrolled judicial discretion into the process. But the New York approach—that if bail is to be denied, it is to be denied on the basis of individual factors—treats each individual in accordance with his individual characteristics, and yet provides a legislative standard—that of "serious risk" of further offenses—that places limits upon judicial discretion. [9]

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9 For an excellent defense of the view that judicial prediction of dangerousness can, indeed, be done, see, e.g., Meyer, supra, at 1146-49.

The Court of Appeals' opinion in this regard is untenable when it is compared to this honorable Supreme Court's holding in Jurek v. Texas, 96 S. Ct. 2950 (1976). There, the Court upheld death penalty sentencing based on a finding of "probability" that the defendant would "commit future crimes of violence" so as to be a "continuing threat to society." See also Barefoot v. Texas, ____ U. S. L. W. ____ (U. S. S. Ct. July 6, 1983) (upholding allegedly "speculative" psychiatric testimony related to "probability of future dangerousness" issue). The "serious risk" standard of New York, which supports very brief detention, is arguably more specific than the "probability" and "continuing threat" standard for death sentencing approved in Jurek and Barefoot. Nor does the evaluation of risks of future occurrences inject "uncontrollable" discretion. As the Court indicated in Jurek, such determinations are common in various stages of the criminal justice system, including (as the Court expressly pointed out) the decision to detain an accused or admit him to bail.

B. The Courts below erred in using testimony based upon social statistics to determine constitutional law.

The courts below were evidently affected by the testimony of sociologist Leslie T. Wilkins.[10] Wilkins' view is that detention should be done, if at all, on a statistical or "actuarial" basis.[11] This approach would consist of determining the "best" predictors by a mathematical model. According to Wilkins, the determinants should be statistically derived (by what he calls "sophisticated" techinques, such as multiple regression analy-

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10 Joint Appendix 184-226.

11 Id. 189-91. A less precise approach, according to Wilkins, is the "clinical" approach, which means "a somewhat systematic and ordered subjective assessment of data." An "actuarial" approach means that "the data are standardized, weighted and subject to the rigors of contemporary decision theory and statistical analysis," according to Wilkins. Id. 189.

sis.[12] Detention should then be controlled by these statistically derived factors (and deviations should be controlled by procedural constraints).

This analysis is inappropriate as a means of determining constitutional law. "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statistics." Lochner v. New York, 198 U. S. 45 (1905) (Holmes, J., dissenting).[13]

If Wilkins' statistical approach were constitutionally required, there would be no reason to distinguish other kinds of fact decisions. Current sentencing ranges under the laws of the United States would be unconstitutional. Sentencing should instead be done by determinate factors, statistically derived from multiple regression analysis. (In fact, Leslie Wilkins has specifically so argued).[14] And in a murder case, the categories of evidence that the jury could consider in determining liability would be fixed in advance, by legislation derived from statistical studies. Multiple regression analysis would also fix the evidentiary factors by which jurors would decide which of two colliding vehicles entered the intersection against a red light. Such is the result respondents are, in fact, advocating in this case for the fact determination on which detention is based.

The Constitution requires sufficiently definite ultimate standards, within the limitations of language precision. A standard may be as general as "reasonableness," "criminal negligence," or "recklessness" (which are all terms used to define offenses in the

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12 Although Wilkins did not use the words "multiple regression analysis," an examination of his testimony and his prior work make the reference clear. Id. 189-91, 195-200, 212; cf. authority cited note 14 infra.

13 Mr. Justice Holmes' view later became law in Nebbia v. New York, 291 U. S. 502 (1934).

14 L. Wilkins, J. Kress, D. Gottfredson, J. Kaplin & A. Gelman, Sentencing Guidelines: Structuring Judicial Discretion (1976).

Model Penal Code, for example) and still be constitutional.[15] The standard of "serious risk" of future crimes as a guide for short detention is clearly within the limits of due process exemplified by these standards.

Actually, insistence upon an unattainable degree of precision is harmful. For example, pretrial release workers who interviewed David Berkowitz, a multiple murderer who adopted the name "Son of Sam," accurately reported that he met statistically derived criteria for release on his own recognizance.[16] A judge applying the sort of criteria that Wilkins criticizes as "subjective" sensibly declined to order Berkowitz's release.

Wilkins' views regarding prediction are not universally held. In sociology textbooks, they are often juxtaposed with sharply differing views.[17] While his arguments are interesting, Wilkins' opinions should not be enacted into positive constitutional law.

C. *The statute here in question is at least as consistent with the purposes of the due process and excessive bail clauses as a categorical definition of nonbailable offenses.*

At the time of adoption of the excessive bail clause and fifth amendment due process clause, pretrial detention was done on the basis of offense categories, without consideration of individualized factors at all. See Pt. II of this Brief, supra. In Murphy v. Hunt, supra, the last case brought before this Court

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15 See, e.g., Nash v. United States, 229 U. S. 373, 374 (1913) (concluding that standards such as criminal negligence are constitutional) (Holmes, J.).

16 This finding was objectively "correct;" it was based on such factors as the defendant's employment, local residence, and lack of prior criminal record.

17 E.g., N. Johnston, L. Savitz & M. Wolfgang, The Sociology of Punishment and Correction sec. IV (1962).

vidualized factors at all. See Pt. II of this Brief, supra. In Murphy v. Hunt, supra, the last case brought before this Court involving pretrial detention, the Nebraska provision at issue allowed bail denial in rape cases, upon "proof evident." The provision was there attacked as failing to require consideration of individual offender characteristics. The lower court had held it unconstitutional, in fact, because it was categorical rather than individualized. It would be ironic if the New York statute here in question were considered unconstitutional because it required an individualized determination, combined with a legislative standard of serious risk.

In truth, there are advantages to both the "categorical" model and the "individualized" model. In a federal system, states should be free to choose between competing approaches with different benefits, and neither should be given exclusive approval here.

CONCLUSION

This honorable Supreme Court should not disallow brief detentions of juveniles pursuant to valid legislative enactments. It should recognize that such detention has historically been considered to comply with due process because of the parens patriae doctrine and because of the philosophical basis of the juvenile justice system, for reasons that remain valid. Even if adult standards are applicable, enactments of this nature should not be invalidated. Finally, the Court should not require that the several States limit themselves to a single form of statute. In particular, an individualized model, as New York's, is at least as consistent with the purposes of the due process clause and with minimal standards of fundamental fairness as a categorical approach. The standard of serious risk does not introduce "uncontrolled" discretion into the process, nor is it unconstitutional merely because it uses existing evidence to evaluate future risks; the decisions of this Court indicate that such a standard is proper.

Respectfully submitted,

David Crump
The Legal Foundation of America
c/o South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amici Curiae